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IN THE
Supreme Court of the United States
October Term, 1975
No. 75-104

UNITED JEWISH ORGANIZATIONS OF
WILLIAMSBURGH, INC., *et al.*,

Petitioners,

v.

HUGH L. CAREY, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF FOR RESPONDENTS-INTERVENORS
IN OPPOSITION**

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Opinions Below

The opinion of the Court of Appeals (Appendix E of the Petition) is reported at 510 F.2d 512. The opinion of the District Court (Appendix H of the Petition) is reported at 377 F.Supp. 1164.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

Do the Fourteenth and Fifteenth Amendments prohibit New York from adopting district lines designed to overcome the discriminatory effect of an earlier districting plan?

Statement of the Case

In January, 1972, the State of New York enacted legislation altering, *inter alia*, the Senate and Assembly lines in Kings County (Brooklyn). Chapter 11, Laws of New York, 1972. On January 31, 1974, New York submitted these 1972 district lines to the Attorney General of the United States for his approval under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. On April 1, 1974, Assistant Attorney General J. Stanley Pottinger, acting on behalf of the Attorney General, disapproved the 1972 redistricting in Kings County on the ground that it have the effect of discriminating against non-whites on the basis of race.

On May 30, 1974, New York adopted a new set of district lines designed to remove the discriminatory aspects of the lines disapproved by the Attorney General. Chs. 588, 589, 590, 591 and 599, Laws of New York, 1974. On July 1, 1974, Assistant Attorney General Pottinger approved the 1974 lines as sufficient to eliminate the discriminatory effect of the old 1972 lines.

On June 11, 1974, petitioners commenced this action in the United States District Court for the Eastern District of New York, alleging that the 1974 lines discriminated against whites, and seeking to compel New York to hold elections using the 1972 lines which the Attorney General had already disapproved. The district court permitted the respondent-intervenors, several individuals and a branch of

the N.A.A.C.P., to intervene as defendants. On July 25, 1974, the district court dismissed the complaint, holding that the 1974 district lines were constitutional and had properly been enacted to correct the discriminatory aspects of the 1972 lines.¹ On January 6, 1975, the Court of Appeals for the Second Circuit affirmed that dismissal.²

Reasons for Denying the Writ

Petitioners suggest first that the Attorney General erred when he disapproved the 1972 district lines. The record before the Attorney General revealed that the 1972 lines, as previous redistricting, had been drawn so as to keep in office, despite a growing non-white population in Kings County, white members of the Assembly and Senate. The vast majority of non-whites were concentrated in a contiguous ghetto in and around the Bedford-Stuyvesant area. The gerrymandering was accomplished by pairing non-white neighborhoods with far larger white areas, so that most non-white voters were placed in districts with substantial white majorities. Voting patterns clearly indicated that white voters voted as a block against a black or Puerto Rican candidate and that no black or Puerto Rican had ever been elected to the legislature from Kings County by a district with a majority of white voters. As a result of this gerrymandering, although 35.6% of the population of Kings County was non-white, only 11.7% of the Senate districts and 23.2% of the Assembly districts had non-white majorities. There were 574,811 non-whites living in predominantly white Senate districts, but only 44,081 whites living in predominantly non-white Senate districts. Similarly, there were 361,707 non-whites living in predominantly white Assembly districts, but only 135,260 whites living in

¹ Petition 53a-58a.

² Petition 7a-50a.

predominantly non-white Assembly districts. In this manner a majority of blacks and Puerto Ricans in Kings County were gerrymandered into districts where a black or Puerto Rican candidate could not be elected, and were thus effectively disenfranchised. Statistical analysis indicated that the few non-white districts, placed at the very center of the ghetto, were quite compact, but the white districts used to disenfranchise non-white voters were far from compact since they were drawn to pair ghetto communities with larger white areas miles away.³ In view of this evidence the Attorney General concluded that New York had failed to establish that the 1972 lines would not have the effect of discriminating against black and Puerto Rican voters.

Petitioners challenge the Attorney General's decision on several grounds. First, petitioners suggest that the Attorney General could only disapprove the 1972 lines if they had been adopted for the purpose of discriminating on the basis of race.⁴ Section 5 of the Voting Rights Act, however, requires that a new districting plan must be free both of a discriminatory purpose and of any discriminatory effect. 42 U.S.C. § 1973c; *City of Richmond v. United States*, 43 U.S.L.W. 4865, 4867-70 (1975); *Georgia v. United States*, 411 U.S. 526, 530 (1973). Second, petitioners claim that the Attorney General erred because he imposed on New York the burden of proving that the 1972 lines had neither a discriminatory purpose or effect.⁵ The applicable regulations expressly place this burden on the state, 28 C.F.R. § 51.19, and the Court upheld this burden in *Georgia v. United States*, 411 U.S. 526, 536-41 (1973). The Court of

³ Memorandum of N.A.A.C.P. In Opposition to Approval of Chapters 11, 76, 77 and 78, New York Laws of 1972; Letter of March 21, 1974 to J. Stanley Pottinger from counsel for the N.A.A.C.P.

⁴ Petition 11.

⁵ Petition 11.

Appeals correctly concluded,⁶ and petitioners virtually concede,⁷ that the correctness of the Attorney General's decision cannot be challenged in the instant proceeding.

The 1974 lines to which petitioners object significantly remedied the discriminatory effect of the disapproved 1972 lines. Under the 1974 plan 30% of the Senate districts and 31.4% of the Assembly districts had non-white majorities, compared to 35.1% of the county population,⁸ a substantial increase over the 1972 figures. The number of non-whites living in Senate districts with white majorities was reduced from 574,811 to 169,880, and the number of non-whites living in Assembly districts with white majorities was reduced from 361,707 to 167,632.⁹ The 1974 lines significantly reduced the previous practice of pairing non-white portions of the Bedford-Stuyvesant area with larger white communities far away.

Under the 1974 lines, whites who constitute 64.9% of the county population, are in a majority of 68.6% of the Assembly districts and 70.0% of the Senate districts. Among the officials elected under the 1974 lines, 77.2% of the Assemblymen are white and 80% of the Senators are white. Despite those facts, petitioners assert that this districting plan unfairly discriminates against whites. Petitioners do not claim that whites have been deprived of a meaningful opportunity to participate in the political processes and to elect legislators of their choice. *White v. Regester*, 412 U.S. 755, 766 (1973). Manifestly white voters in the county exercise political power significantly greater than their numbers alone would warrant. Petitioners urge,

⁶ Petition 20a-22a.

⁷ Petition 9, n.3.

⁸ Petition, 27a, n.21.

⁹ See Interim Report of the Joint Committee on Reapportionment, A29, A31.

rather, that in remedying the discriminatory effect of the 1972 lines New York could not consider whether the proposed 1974 lines also discriminated against blacks and Puerto Ricans.

There was manifestly no way the New York legislature could have remedied the discriminatory effect of the 1972 lines without considering the racial composition of possible new districts. Clearly the Attorney General, in passing on new districts submitted by New York, was obligated to consider the racial composition of those districts in order to decide whether they, like the 1972 districts, had a discriminatory effect. It would have been irresponsible for New York to have adopted a series of district plans at random, without regard to their discriminatory effect, until it stumbled across a plan without the forbidden effect. Petitioners do not suggest New York should have done so, nor do they suggest *any* way in which the state could have corrected the defects of the 1972 lines. Petitioners' contentions, if accepted, would mean that, even if the 1972 lines in fact violated section 5 of the Voting Rights Act, New York could not remedy that violation.

The "65 percent quota" to which petitioners object is nothing of the kind. The central defect of the 1972 lines was that they placed most of the non-white voters in districts in which a majority of the eligible voters were white. In assessing whether the new lines had overcome the discriminatory effect of the 1972 lines, it was necessary for New York to determine whether the majority of eligible voters in each proposed district were white. Available census data, however, reveals only the racial composition of the *total* population of each district, not of the *voting age* population. Due to the unusually large number of non-white children in Kings County, a district with 65% non-white total population has a voting age population approx-

imately 50% non-white.¹⁰ Thus the 65 percent standard was used, not to fix a particular quota, but merely to determine if the discrimination found by the Attorney General had been eliminated, i.e., to determine whether disproportionate numbers of non-whites were still in districts in which a majority of eligible voters were white. The city council districts which this Court approved in *City of Richmond v. United States*, 43 U.S.L.W. 4865, 4869 (1975), were at least 64% non-white.

The 1974 district lines did not "guarantee" non-white control of the new districts. The Attorney General, in approving the 1974 lines, rejected the contention that he should require greater non-white majorities, reasoning that the new lines provided a "realistic opportunity for minorities to elect a candidate of their choice,"¹¹ and that they were entitled to no more. In the five new districts where non-whites were for the first time a majority,¹² white candidates won the elections in four.¹³ Nor do the 1974 lines "maximize" non-white representation. It clearly would have been possible to increase the non-white population in many districts and to create additional majority non-white districts, but the Attorney General in approving

¹⁰ In 1970 75.3% of all whites were 18 or over, but only 51.1% of all Puerto Ricans and only 58.2% of all blacks. United States Census, General Social and Economic Characteristics, New York, pp. 615, 644, 661. In addition, due to a defect in the census questionnaire, the population figures used by the New York legislature may have overstated the non-white population by as much as 20%. Memorandum Of Applicants For Intervention in Support of Motions to Dismiss, pp. 26-27; Table 3.

¹¹ Petition, 9a.

¹² The 57th and 59th Assembly Districts, 17th and 23rd Senate Districts, and the 14th Congressional Districts.

¹³ White candidates were elected in all but the 23rd Senate District.

the 1974 lines declined to require this.¹⁴ The 1974 lines do not create a number of majority non-white districts that is excessive compared to the county population; the proportion of Senate and Assembly districts with non-white majorities is significantly lower than the proportion of the county population which is non-white.¹⁵ Compare *City of Richmond v. United States*, 43 U.S.L.W. 4865, 4868-69 (1975).

The core of petitioners' contention is that the Fourteenth and Fifteenth Amendments prohibit the states from deliberately adopting legislation to remedy racial discrimination. Such a construction would render the amendments literally self-defeating, forbidding both discrimination and any remedy therefor. In *City of Richmond v. United States*, 43 U.S.L.W. 4865 (1975), this Court held that, to overcome the potential discriminatory effect of an annexation, the city was obligated to deliberately adopt a "ward system [which] fairly reflects the strength of the Negro community after the annexation," and which would afford non-whites "representation reasonably equivalent to their political strength in the enlarged community". 43 U.S.L.W. at 4868, 4869. *City of Richmond* holds that an affected jurisdiction not only can but must consciously fashion a racially fair districting system to overcome the discriminatory effect of an earlier election scheme disapproved by the Attorney General. The remedy adopted by New York in 1974 was not merely permissible, it was mandatory.

Even before *City of Richmond* this Court recognized that discrimination could not be remedied without considering the racial consequences of the proposed relief. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18

¹⁴ Memorandum of Decision, Nos. V6541-47, pp. 14-18.

¹⁵ *City of Richmond v. United States*, 43 U.S.L.W. 4865, 4868-69 (1975).

(1971) upheld the use of a racially based pupil assignment plan to end the effects of discrimination, on the ground that "[a]wareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations." 402 U.S. 1, 18 (1971). In a companion case the Court held unconstitutional a North Carolina law which prohibited the assignment of students "on account of race," reasoning that such a statute would obstruct the creation of effective remedies. "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *North Carolina Board of Education v. Swann*, 402 U.S. 43, 45-46 (1971). The lower courts have consistently recognized the need to use racial criterion to remedy racial discrimination.¹⁶

There are, moreover, serious questions as to petitioners' standing to maintain this action. Under the Voting Rights Act the Attorney General's decisions can only be challenged by the State of New York in the District Court for the District of Columbia, not by private parties in other courts. Despite the changes worked by the 1974 lines, the incumbent white Assemblyman who in the past represented petitioners' community was re-elected, and white voters still control more legislative districts than their numbers alone would warrant. The petitioners themselves repeatedly testified that they had no interest in being in a majority

¹⁶ See e.g. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931-32 (2d Cir. 1968) (discrimination in urban development); *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971) (discrimination in public housing); *Associated General Contractors v. Altshuler*, 490 F.2d 9, 16 (1st Cir. 1973), cert. denied 416 U.S. 957 (1974) (employment discrimination); *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966) (discrimination in the selection of grand jurors).

white district.¹⁷ Although plaintiffs object that their community has been divided between two Assembly districts, the record reveals that this was done to keep as many of them as possible in a heavily white district, a practice of which plaintiffs do not complain.¹⁸ Petitioners' desire to litigate the abstract questions posed by the Petition does not amount to a clear and substantial injury arising from the alleged illegality of which they complain.

The decision of the Court of Appeals below is both correct and consistent with the decisions of this Court and other courts of appeals. This case presents no important questions of law which this Court has not already settled.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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¹⁷ Transcript of Hearing of June 20, 1974, pp. 41-42, 104-05, 112.

¹⁸ Mr. Seolaro, who drafted the 1974 lines for the Legislature, at first testified that this division was necessary to comply with Assistant Attorney General Pottinger's decision. Petition 12. But on cross-examination he conceded it would have been possible to comply with the Pottinger decision and keep plaintiffs' community intact, and that he had not done so because that could have been accomplished only by placing the community in a district with a substantial non-white majority. Transcript of Hearing of June 20, 1974, pp. 171-75; see Petition 25a.